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Supreme Court of The United States

No. [redacted] October Term 1960

4 Cir. No. 8122
Tax Court

GRANNIS & SLOAN, INC., AND CONTRACTORS MACHINERY COMPANY,

Petitioners,

v.

THE RENEGOTIATION BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

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THE RENEGOTIATION BOARD,

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Grannis & Sloan, Inc., and Contractors Machinery Company petition that a writ of Certiorari issue to review a decision of the United States Court of Appeals for the Fourth Circuit, entered January 12, 1961, holding that the United States Court of Appeals for the Fourth Circuit was without jurisdiction to review the determination of the Tax Court in a Renegotiation case.

OPINIONS BELOW

The Opinion of the Tax Court filed Feburary 8, 1960, is reported as Memorandum, Findings of Fact and Opinion in T. C. Memo, 1960-12. It is not published. The decision of the Renegotiation Board was dated May 18, 1956, and is not published or reported. The Opinion of the United States Court of Appeals for the Fourth Circuit appears at Appendix page 18 herein and is reported in 286 F. 2d 908 (C.A. 4th 1961).

JURISDICTION

The decision of the Court of Appeals is dated January 12, 1961, and was also entered on that date.

There was no Petition for a rehearing. An Order granting an extension of time within which to Petition for Writ of Certiorari was signed April 3, 1961, by the Honorable Earl Warren, Chief Justice of the United States; the terms of said Order extended the time for filing Petition For Writ of Certiorari to and including June 11, 1961.

The statutory provisions believed to confer on this Court jurisdiction to review the opinion in question by Writ of Certiorari are 28 U.S.C., § 1254; 28 U.S.C. § 2101 and Rules 21 and 22 of the Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

A. Is a citizen afforded "due process of law" when he is deprived of property by an independent administrative agency in the Executive Branch of the Government and at the same time is prohibited and prevented from any judicial review of such taking by any court of the United States?

Expressed in the terms and circumstances of the case at hand the question presented is this:

The Tax Court is given jurisdiction to try "*de novo*" the issues involved in Renegotiation matters and to collect from the person involved any amount determined to be excessive profits.

The Tax Court of the United States is not a court but an administrative agency; the statute creating the Tax Court expressly provides that it "shall be continued as an independent agency in the *Executive Branch* of the Government." 26 U.S.C. § 7441.

The decision of the single judge of the Tax Court who tried and decided this case was held to be non-reviewable; the United States Court of Appeals for the Fourth Circuit held that it had no jurisdiction to entertain any appeal from such decision.

Petitioners will be deprived of $75,000.00 by a single member of an administrative agency with no judicial review being available in any manner, if this decision is not reversed.

Does the taking of a person's property by an agency in the Executive branch of the Government with no right of any judicial appeal either as to questions of law or fact, constitute a taking of a person's property without due process of law in violation of the Fifth Amendment to the United States Constitution?

B. Can the Renegotiation Act be constitutionally and harmoniously interpreted with other provisions of the United States Code so as to allow some limited judicial review and thereby avoid the unconstitutional construction given by the United States Court of Appeals in this case?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Constitutional.

Amendment 5. No person shall be • • • deprived of life, liberty, or property, without due process of law; • • •

B. Statutory.

50 U.S.C. App., §1191 (e), 1218, 1218(a).

26 U.S.C. §§ 7441, 7482, 7444, 7459, 7460.

See Appendix page 22 for full text.

STATEMENT OF THE CASE

Petitioners, North Carolina corporations, during the fiscal year ending December 31, 1952, had contracts with the United States which were renegotiable under the provisions of the Renegotiation Acts (50 U. S. C. App. § 1191 et seq.). Pursuant to these Acts, the Renegotiation Board increased the profit for renegotiation purposes as reported by Petitioners from approximately $84,000 to approximately $189,000, and determined that Petitioners realized $75,000 of excessive profits from their renegotiable business. The Order of the Renegotiation Board was entered May 18, 1956. Petitioners appealed to the Tax Court.

A trial *de novo* as required by the Renegotiation Act (50 U. S. C. App. § 1218) was conducted on January 19, 1959, by a single judge of the Tax Court; he also determined that Petitioners had realized $75,000 of excessive profits from renegotiable business. His decision was handed down on February 8, 1960.

Timely appeal followed from the decision of the Tax Court to the United States Court of Appeals for the Fourth Circuit. Venue on such appeals in Renegotiation matters is governed by a 1956 amendment to the Renegotiation Acts. 50 U.S.C. App. § 1218 (a). The United States took the position before the Fourth Circuit that there is no jurisdiction in the United States Court of Appeals to review a Tax Court determination in a renegotiation matter. This position was sustained by the Circuit Court which held:

> "Plainly, Congress intended to deprive the Courts of Appeals of jurisdiction to review a Tax Court determination of the amount of a contractor's excessive profits."

The only thing reviewable by the Court of Appeals is whether the Tax Court, in fact, had jurisdiction. Accordingly, the appeal of Petitioners to the United States Court of Appeals was dismissed for lack of jurisdiction and the appropriation of $75,000 from Petitioners was held to be beyond the scope of any judicial review whatever.

BASIS FOR FEDERAL JURISDICTION

The basis for Federal jurisdiction in the Tax Court is 50 U.S.C. App., § 1191 and § 1218. The basis for Federal jurisdiction in the appeal to the United States Court of Appeals is 50 U.S.C. App., § 1218(a), and 26 U.S.C., § 7441, § 7482 (formerly 26 U.S.C., § 1100 and § 1141, 1939 Int. Rev. Code).

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this court.

2 The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

ARGUMENT

A. Is a citizen afforded "due process of law" when he is deprived of property by an independent administrative agency in the Executive Branch of the Government and at the same time is prohibited and prevented from any judicial review of such taking by any court of the United States?

The interpretation of the Renegotiation Act (50 U.S.C. § 1191(e) (1), et seq.) given by the United States Court of Appeals in this case establishes a proposition believed to be unique in the jurisprudence of this country, namely, an Executive agency of the Government may appropriate property with no right of judicial review by the citizen either as to the facts or law; the only suggestion of judicial review, if indeed it can be called judicial review, is that the Court of Appeals may decide whether the Tax Court originally had jurisdiction. According to the holding in this case, the only question subject to review is whether the Tax Court proceeding was void or not void, but that is the extent of the review; the decision of the Tax Court may flaunt every established principle of law; it may be unsupported by any evidence; it may be contrary to all of the evidence; it may be based on caprice or irrelevant evidence, yet the Courts of this land are powerless to do anything about it.

Historically, it has always been a fundamental and firmly established principle that a person's property shall not be taken without "due process of law" and law, as there used, has always carried the connotation of some sort—even though it be limited—of judicial protection or supervision.

The question presented by this Petition was adumbrated by Justice Rutledge in *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U. S. 752, 67 S. Ct. 1493 (1947), where he stated in regard to this very aspect of the Renegotiation Act:

> "We do not express any opinion, indeed we explicitly reserve decision, upon the question of the finality of Tax Court decisions in these matters. • • •
> "We are not forced in this case, however, to decide whether Congress intended to give the Tax Court the last word upon all questions of fact and law, *or whether it could do so if that were surely its purpose.* • • •" 331 U. S. 752, 771, 67 S. Ct. 1493, 1502. (emphasis supplied)

The same doubt as to the constitutionally of such provisions was again raised in the case of *Lichter v. United States*, 334 U. S. 742, 68 S. Ct. 1294, where the Court stated:

> "• • • we do not express an opinion upon, the finality which would have attached to a redetermination by the Tax Court if such a redetermination had been sought and made." 334 U. S. 742, 791, 68 S. Ct. 1294, 1319.

These cases held that such a question could not be considered by the Supreme Court since the various petitioners had not followed the Tax Court procedure and, therefore, could not question the legality of such procedure.

The United States Supreme Court did reach the question of the *interpretation* of the Renegotiation Act in *United States v. California Eastern Line*, 348 U.S. 351, 75 S. Ct. 419 (1955), and held that a Tax Court decision as to the existence or nonexistence of a renegotiable contract was reviewable because that went to the question of jurisdiction. The Court also stated by way of *obiter dictum* that "Tax Court determinations of the amount of excessive profits, if any, should be final and nonreviewable. We agree that a § 1141 Court of Appeals review should not upset such determinations." This dictum influenced, or was decisive of, the opinion by the Court of Appeals in this case.

Since the United States Supreme Court did hold that a question as to the jurisdiction of the Tax Court was presented which could be reviewed by the Circuit Court, it did not, of course, reach the question of the constitutionality or legality of making a decision by an Executive agency final and nonreviewable.

So far as research has disclosed, the question raised here has been raised, but not properly presented, in only two circuits of the United States Courts of Appeals. *Lichter v. United States*, 160 F. 2d 329 (C.A. 6th 1947); *Pownall v. United States*, 159 F. 2d 73 (C.A. 9th 1947) (following *Spaulding v. Douglas*, 154 F. 2d 419 (C.A. 9th 1946)). In each of these cases the individual claiming the invalidity of preventing review of the Tax Court decision had in fact *not* appealed to the Tax Court from the Renegotiation Board determination. The Courts of Appeals did attempt to reach the constitutional question here presented.

The appeals in the *Lichter Case* and *Pownall Case* were decided in one opinion, *Lichter v. United States*, *supra*. The United States Supreme Court while upholding the general constitutionality of the Renegotiation Act, was careful to point out specifically that the question of the constitutionality of the non-review provisions of the Act (now before this Court by this Petition For Writ of Certiorari) was *not* before the Court in the *Litchter* Case and *Pownall* Case (and therefore also the *Spaulding* Case) and decision was reserved on it, as previously shown.

Thus, the question suggested in the earlier Supreme Court cases involving the Renegotiation Act is, for the first time, now presented to this Court. Those two cases passed on the constitutionality of the Renegotiation Act but in so doing, expressly reserved opinion on the question now presented.

At the outset it should be made clear that the proposition here advanced is not that this Court or any judicial court should necessarily revise factual findings or decisions based on the facts found by administrative or Executive agencies. It cannot be gainsaid that administrative agencies such as the Tax Court should be selected to handle certain types of cases because of the familiarity of such agencies with business and accounting practices, etc. It is granted that judges should not be called upon to replace the decisions of such agencies with their own decisions. However, it is one thing to limit the right of judicial review and still provide minimal due-process procedures and

another thing to eliminate completely the right of any judicial review.

As the Court of Appeals interprets the law in this case, Congress may vest in the Tax Court, an agency of the Executive Branch of the Government, the power to appropriate property with no right of the property owner to appeal as to the law, the lack of any competent evidence to sustain the findings, the arbitrary action of such Executive agency or the like. If such an agency of the Executive Branch of the Government may be vested with such power and deprive the courts of any right to insure due process of law, why could not Congress vest such power in the Renegotiation Board or in the Department of the Defense or in an individual in the Department of the Defense or in the President himself, or his appointee? Indeed, under the actual practice before the Tax Court, it is an individual's opinion—one judge of the Tax Court—which appropriates a person's property. The case is not argued before *nor even reviewed by* the Tax Court or any of the other judges except, perhaps, the chief judge.

26 U.S.C. § 7444 authorizes the chief judge of the Tax Court to divide the Tax Court into divisions of one or more judges. That was done in this case.

26 U.S.C. § 7460 provides:

> "A division shall hear, and make a determination upon, any proceeding instituted before the Tax Court and any motion in connection therewith, assigned to such division by the chief judge, and *shall make a report of any such determination which constitutes its final disposition of the proceeding.*" (emphasis added)
>
> "(b) The report of the division shall become the report of the Tax Court within 30 days after such report by the division, unless within such period the chief judge has directed that such report shall be reviewed by the Tax Court. • • •"

A person has no right to obtain a review by the Tax Court of a single judge's decision. *Kennedy Name Plate Co. v. C.I.R.*,

170 F. 2d 196 (C.A. 9th 1948); *Sisto Financial Corp. v. C.I.R.*, 149 F. 2d 268 (C.A. 2d 1945).

> "The power to call for a review by the whole court rests with the presiding judge (§ 118(b), Title 26 U.S.C.A. (Int. Rev. Code)); his decision is not reviewable by us for any reason; it is a detail of intramural administration." *Sisto Financial Corp. v. C.I.R., supra*, 149 F. 2d at page 269, 270.

The problem presented here, in the ultimate analysis, reaches to the very foundation of the separation of powers guaranteed by our Constitution. If the instant decision is allowed to stand, this Court will have stamped its approval on legislation which divests the courts of the United States of any judicial power over such legislative or executive bodies.

It is no answer to this point to contend that because the Court of Appeals may review a Tax Court decision as to the question of jurisdiction, that is a sufficient safeguard. It is not in the cases where the Executive or administrative agencies have no jurisdiction that their power is most likely to be abused. It is not in the cases where the decisions of such agencies are void for lack of judisdiction that judicial protection is needed; it is in the field where the Executive and administrative agencies do have jurisdiction that the right of judicial review is essential to afford citizens due process of law.

It is not so much what the right of review embodies. It is the fact of judicial review that tempers the decisions of administrative bodies; it is the certain awareness that their acts and their decisions may be exposed to the impartial and penetrating light of judicial scrutiny that is the guarantee of administrative fairness.

The very existence of the power of judicial review, as well as the exercise of such power by the court, produces administrative fairness and guarantees due process of law.

It is not the province of a Petition For Writ of Certiorari to completely argue the merits of the case; however, to emphasize that the Renegotiation Act as now interpreted is a radical and complete departure from the accepted standards of due process, a few of the score upon score of representative

decisions will be cited briefly. Nearly all of the cases found hold that *some* right of judicial review from administrative decisions is necessary to satisfy the requirements of due process.

An early example of such holding by the United States Supreme Court is *Chicago, M. & St. P. Ry. Co. v. Minnesota*, 134 U. S. 418, 10 S. Ct. 462 (1890). In that case the Supreme Court of Minnesota had construed a railroad rate-fixing statute as allowing the rates published by the Railroad Commission to be final and conclusive as to what are equal and reasonable charges. The United States Supreme Court stated emphatically that the due process of law requirements prohibited giving an administrative decision absolute finality without some right of judicial review.

> "In other words, although the railroad company is forbidden to establish rates that are not equal and reasonable, there is no power in the courts to stay the hands of the commission, if it chooses to establish rates that are unequal and unreasonable. This being the construction of the statute by which we are bound in considering the present case, we are of opinion that, so construed, it conflicts with the constitution of United States in the particulars complained of by the railroad company. It deprives the company of its rights to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions, or possessing the machinery of a court of justice." 10 S. St. 462, 466.

That case is similar to the case of *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287, 40 S. Ct. 527 (1920). In that case the question was whether the rates of a water company were established under a procedure which did not allow for judicial review and if so, whether such procedure was violative of the due process requirements imposed by the

Fourteenth Amendment. The Court held that the absence of judicial review did violate due process.

> "Looking at the entire opinion we are compelled to conclude that the Supreme Court [of Pennsylvania] interpreted the statute as withholding from the courts power to determine the question of confiscation according to their own independent judgment when the action of the commission comes to be considered on appeal.
>
> "The order here involved prescribed a complete schedule of maximum future rates and was legislative in character. [citing cases] *In all such cases, if the owner claims confiscation of his property will result, the state must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgement as to both law and facts; otherwise the order is void because in conflict with the due process clause.* Fourteenth Amendment." 253 U. S. 287, 288, 40 S. Ct. 527, 528. (emphasis supplied)

The same holding applicable to state administrative bodies was followed in regard to Federal agencies in *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 56 S. Ct. 720 (1936). In that case, although the decision of the Secretary of Agriculture was affirmed on the merits, the Court restated the fundamental principles which demand some judicial review of all decisions.

> "But the Constitution fixes limits to the ratemaking power by prohibiting the deprivation of property without due process of law or the taking of private property for public use without just compensation. When the Legislature acts directly, its action is subject to judicial scrutiny and determination in order to prevent the transgression of these limits of power. The Legislature cannot preclude that scrutiny or determination by any declaration or legislative finding. *Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained.* • • • But to say that their findings of fact may be made conclusive where constitutional rights

> of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards. That prospect, with our multiplication of administrative agencies, is not one to be lightly regarded. It is said that we can retain judicial authority to examine the weight of evidence when the question concerns the right of personal liberty. But, if this be so, it is not because we are privileged to perform our judicial duty in that case and for reasons of convenience to disregard it in others. The principle applies when rights either of person or of property are protected by constitutional restrictions. *Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority.*" 298 U. S. 38, 51, 52; 56 S. Ct. 720, 726 (emphasis supplied).

To the same effect is the case of *Baltimore & O. R. Co. v. United States*, 298 U. S. 349, 56 S. Ct. 797 (1936), which involved the question of rates established by the Interstate Commerce Commission. The Court stated:

> "The just compensation clause may not be evaded or impaired by any form of legislation. Against the objection of the owner of private property taken for public use, the Congress may not directly or through any legislative agency finally determine the amount that is safeguarded to him by that clause. • • • *The due process clause assures a full hearing before the court or other tribunal empowered to perform the judicial functions involved.*" 298 U. S. 349, 368, 56 S. Ct. 797, 807. (emphasis added)

Similar holdings can be cited in practically all facets of government administrative agencies. *E.g., Estep v. United States*, 327 U. S. 114, 66 S. Ct. 423 (1946) (Selective Training and Service Act of 1946); *Ng Fung Ho v. White*, 259 U. S. 276, 42 S. Ct. 492 (1922) (Deportation of Alien).

Numerous authorities can be cited from many of the forty-

eight states sustaining the same proposition above quoted. *Idaho Mut. Benefit Association v. Robinson*, 154 P. 2d 156 (Idaho S. Ct. 1944), involved the finality of a decision by the Industrial Accident Board of Idaho requiring an employer to pay certain compensation premiums. It was contended that a portion of the act requiring submission to the jurisdiction of the Board was unconstitutional. In passing on this contention the Supreme Court of Idaho held that some right of judicial review of administrative decision is essential to due process.

> "While the authorities are not unanimous, we believe *the better rule is to the effect that in connection with hearings before administrative boards of this kind unless an appeal is provided therefrom to a court, even though the scope of review be limited, due process is not satisfied.* [citing cases] The requirement that any appellant by appeal submit to the jurisdiction of a board in an appeal wherein he might be questioning jurisdiction is violative of this principle. This portion of the act ("The filing of an appeal under this section by any person shall constitute a submission by such person to the jurisdiction of the Board and") is therefore unconstitutional and cannot be sustained." 154 P. 2d 156, 161 (emphasis supplied).

In *Laisne v. State Board of Optometry*, 123 P. 2d 457, (Cal. S. Ct. 1942), the Court made a rather thorough review of the cases bearing on the questions raised by this Petition and concluded:

> "The cases interpreting the State Bar Act, St. 1927, p. 38, strengthen our conviction that if finality were given to the action of an administrative agency, such would be an unconstitutional exercise of judicial power." 123 P. 2d 457, 463

Apposite to the proposition here presented is the following language from this decision:

> "Therefore, if a body other than one of the enumerated courts makes findings of fact, on those findings determines that the provisions of a certain statute have been violated, and issues an order or renders a judg-

ment which has the effect of depriving a person of a valuable property right, *such action denies the aggrieved party the due process of law guaranteed to him by the state and federal Constitutions, unless such action by such body may be questioned in a court of law.* It should always be kept in mind that *the evil of administrative action which must be guarded against is not the fact-finding power, but the conclusiveness of fact-finding power coupled with the order based on the findings made which would deprive a person of a property right.* Such is the full exercise of judicial power, and such power in this state can be exercised only by one of the enumerated courts." 123 P. 2d 457, 466 (emphasis supplied)

B. Can the Renegotiation Act be constitutionally and harmoniously interpreted with other provisions of the United States Code so as to allow some limited judicial review and thereby avoid the unconstitutional construction given by the United States Court of Appeals?

In 1956 Congress amended the Renegotiation Act to provide specifically for venue of appeals from the Tax Court to the United States Courts of Appeals in Renegotiation matters. 50 U. S. C. § 1218(a):

"§ 1218a. Venue of appeals from Tax Court decisions

"A decision of the Tax Court of the United States under Section 108 of this Act [section 1218 of this appendix] may, to the extent subject to review, be reviewed by—

"(1) The United States Court of Appeals • • •."

If the opinion of the Court of Appeals in this case is sustained, the only significance of the 1956 amendment would be to fix the venue of appeals from the Tax Court only where the jurisdiction of the Tax Court is in question. In other words, under this interpretation it is only where the contention is made that the Tax Court proceedings were void, that the 1956 amendment would have any meaning. Such a restricted meaning should not be given to this statute. Taken with the other provisions of the law and the proper interpretation of the

Renegotiation Act, all of these statutes can be harmoniously reconciled.

The language of the Renegotiation Act itself does not compel the conclusion that *no* judicial review of Tax Court proceedings can be held.

The pertinent provisions of 50 U.S.C. App. § 1191 (e) provide that "• • • such court [Tax Court] shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits • • •."

This provision is consistent with judicial review. The Tax Court should have exclusive jurisdiction to *determine the amount*, just as a district court and jury has exclusive jurisdiction to *determine the amount* of damages payable to a person injured by another. That does not mean that an appellate court cannot review questions of law or sufficiency of evidence presented to the Tax Court or, to the judge and jury in the personal injury suit.

The next provision of this sentence reads: "and such determination shall not be reviewed or redetermined by any court or agency." Again, the "determination" by the Tax Court is what cannot be "reviewed or redetermined"; the *proceedings* before the Tax Court are not removed from judicial review; the questions of law raised are not stated to be beyond judicial review; the adequacy of the evidence is not taken from the customary inherent review powers of the courts.

The rather obvious intendment is to prohibit a "review or redetermination" of the Tax Court "determination." It is to prevent a substitution of judicial "determination" for the factual determination of the administrative body.

This interpretation becomes even more compelled when considered with other provisions of the Federal statutes.

The general statute on courts of review grants the United States Courts of Appeal "exclusive jurisdiction to review *the decisions* of the Tax Court, except as provided in section 1254 of Title 28 of the United States Code in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; • • •"

In the grant of "exclusive jurisdiction to review the decisions of the Tax Court" there is no exception to Renegotiation cases. It is a grant of jurisdiction to review all decisions of the Tax Court (except as relates to the jurisdiction of the Supreme Court).

This general grant of appellate jurisdiction when read in conjunction with the 1956 Amendment to the Renegotiation Act is even more clearly applicable to this and similar cases. The 1956 Amendment, 50 U.S.C. App. § 1218(a), provides for venue of appeals from Tax Courts decisions.

> "A decision of the Tax Court of the United States under Section 108 of this Act [section 1218 of Title 50 U.S.C. App.] may, to the extent subject to review, be reviewed by—
>
> "The United States Court of Appeals • • •"

What justification is there for construing these three statutory provisions to limiting appellate review to the question of jurisdiction of the Tax Court—the question of "void or not void"?

Apart from the unreasonableness of such construction, it becomes imperative to avoid such construction if otherwise the statute would be unconstitutional.

Petitioners raised the question of the invalidity of the non-review provisions in their brief before the Court of Appeals, stating in their brief "such a restriction upon judicial review is invalid". However the Court of Appeals did not pass on this issue.

CONCLUSION

To allow an Executive agency to appropriate a person's property with no right of judicial review represents an extreme departure from the accepted and usual course of judicial proceedings and the constitutional separation of powers. It is believed that if the Petition is granted, upon argument before the Court, it can be demonstrated that such a procedure is with out precedent and clearly contrary to the United States Consituation. It is also believed that if this Petition is granted, it

can be demonstrated that the various provisions of the Renegotiation Act and other provisions of the United States Code can be interpreted in a manner consistent with the intent of the law and in harmony with the Constitution and its due-process requirements.

The United States Court of Appeals has departed from the clearly established principles of due process in holding that it had no jurisdiction of this case.

The interpretation of the Renegotiation Act on this issue presents a fundamental constitutional question of day-to-day, nationwide importance which has not been but should be settled by this Court.

Respectfully submitted,

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May 31, 1961

APPENDIX

OPINION OF
UNITED STATES COURT OF APPEALS
For The Fourth Circuit

HAYNSWORTH, Circuit Judge:

By this proceeding, a contractor seeks review of a determination of the Tax Court that it realized $75,000 of excess profits from renegotiable business in its fiscal year ending December 31, 1952. We must dismiss the petition for lack of jurisdiction.

By § 403(e) (1) of the Renegotiation Act of 1942,[1] Congress expressly provided that the Tax Court of the United States should "have exclusive jurisdiction, by order, to finally determine the amount, if any of such excessive profits received • • • by the contractor • • •, and such determination shall not be reviewed or redetermined by any courts or agency." Plainly, Congress intended to deprive the Courts of Appeals of jurisdiction to review a Tax Court determination of the amount of a contractor's excessive profits.

Because the Courts of Appeals have a general jurisdiction to review decisions of the Tax Court,[2] the Court of Appeals for the District of Columbia Circuit, in which, alone, until 1956, there was venue of renegotiation cases,[3] reconciled the two statutes by deciding that it could review the Tax Court's determination of its own jurisdiction, particularly the existence of renegotiable business, but that it had no jurisdiction to review the Tax Court's determination of the amount, if any, of excessive profits realized upon business subject to renegotia-

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[1] 50 USCA App. § 1191(e) (1).

[2] 26 USCA § 7482(a) (1954 Code).

[3] 26 USCA § 7482(b) (1). Similar provisions were in § 1141 of the 1939 Code. See *Ebco Manufacturing Company v. Secretary of Commerce*, 6 Cir., 221 F.2d 902. In 1956 Congress enacted a new venue section for renegotiation cases to the extent they are reviewable. 50 USCA App. 1218a.

tion.[4] This reconciliation of the two statutes was approved by the Supreme Court. *United States v. California Eastern Line, Inc.*, 348 U.S. 351, 75 S. Ct. 419, 99 L.Ed. 383.

There is no question here of the Tax Court's jurisdiction. The contractor had earnings in 1952 from business subject to renegotiation. The only issue is the amount of profits actually realized on that business and the extent to which those profits may be regarded as "excessive" within the contemplation of the Act. The issue is presented on the basis of objection to specific findings on a number of subsidiary questions. These questions are directed to the propriety of the Tax Court allocation and proration of certain receipts and expense items as between renegotiable and nonrenegotiable business. The contractor contends that certain expense items were improperly attributed to nonrenegotiable business, while other items of general expense were improperly prorated. He also contends that certain receipts which the Tax Court treated as equipment rentals subject to renegotiation should have been treated as payments upon conditional sales agreements because the equipment was subsequently sold under agreements which credited the purchaser with rentals previously paid.

Particularization of the issue does not make it judisdictional however Whether specific items of receipts or of disbursements, or a greater or smaller proportion of them, should have entered into the Tax Court's computation of profits on renegotiable business, the questions are but the means by which the contractor seeks to contest the determination of the amount of its excessive profits They are the kind of questions which routinely arise in renegotiation cases. They are the kind of questions which the Congress must have had in contempla-

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[4] *United States v. California Eastern Line, Inc.*, D.C. Cir., 211 F.2d 635; *Knu-Vise, Inc. v. War Contracts Price Adjustment Board*, D.C. Cir., 195 F.2d 198; *Lowell Wool By-Products Co. v. War Contracts Price Adjustment Board*, D.C. Cir., 192 F.2d 405; *Psaty & Fuhrman, Inc., v. Stimpson*, D.C. Cir., 182 F.2d 985; *Eastern Machinery Co. v. Under Secretary of War*, D.C. Cir., 182 F.2d 99; *U. S. Electrical Motors, Inc. v. Jones*, D.C. Cir., 153 F.2d 134. See also, *Ebco Manufacturing Company v. Secretary of Commerce*, 6 Cir., 221 F.2d 902; *Vaughn Machinery Company v. Renegotiation Board*, 6 Cir., 273 F. 2d 235.

tion when it provided that the Tax Court's determination of the amount of excessive profits should not be reviewable.

Since the petition presents only nonreviewable matter, we have no jurisdiction to consider its merits.

Petition dismissed.

SUPREME COURT OF THE UNITED STATES

No. , *October Term, 1960*

GANNIS & SLOAN, INC., ET AL.,

Petitioners,

v.

THE RENEGOTIATION BOARD

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 11th, 1961.

(S) EARL WARREN
Chief Justice of the United States.

Dated this 3rd
day of April, 1961.

STATUTES INVOLVED

50 U.S.C. App., §1191 (e), 1218, 1218(a).

"(1) Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accured by such contractor or subcontractor may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the mailing of the notice of such order under subsection (c) (1) [of this section], file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency. The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo. For the purposes of this subsection the court shall have the same powers and duties, insofar as applicable, in respect of the contractor, the subcontractor, the Board and the Secretary, and in respect of the attendance of witnesses and the production of papers, notice of hearings, hearings before divisions, review by the Tax Court of decisions of divisions, stenographic reporting, and reports of proceedings, as such court has under sections 1110, 1111, 1113, 1114, 1115(a), 1116, 1117(a), 1118, 1120, and 1121 of the Internal Revenue Code [Title 26] in the case of a proceeding to redetermine a deficiency. In the case of any witness for the Board or Secretary, the fees and mileage, and the expenses of taking any deposition shall be paid out of appropriations of the Board or Department available for that purpose, and in the case of any other witnesses, shall be paid, subject to rules prescribed by the court, by the party

at whose instance the witness appears or the deposition is taken. The filing of a petition under this subsection shall not operate to stay the execution of the order of the Board under subsection (c) (2) [of this section].

"(2) Any contractor or subcontractor (excluding a subcontractor described in subsection (a) (5) (B) (of this section) aggrieved by a determination of the Secretary made prior to the date of the enactment of the Revenue Act of 1943, with respect to a fiscal year ending before July 1, 1943 as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of the enactment of the Revenue Act of 1943 [Feb. 25, 1944], file a petition with The Tax Court of the United States for a redetermination thereof, and any such contractor or subcontractor aggrieved by a determination of the Secretary made on or after the date of the enactment of the Revenue Act of 1943 [Feb. 25, 1944], with respect to any such fiscal year, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of such determination, file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have the same jurisdiction, powers, and duties, and the proceeding shall be subject to the same provisions, as in the case of a petition filed with the court under paragraph (1), except that the amendments made to this section by the Revenue Act of 1943 which are not made applicable as of April 28, 1942, or to fiscal years ending before July 1, 1943, shall not apply."

50 U.S.C. App. § 1218:

"§ 1218. Review by the Tax Court

"Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may—

"(a) if the case was conducted initially by the Board itself—within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the mailing under section 105 (a) [section 1215 (a) of this Appendix] of the notice of such order, or

"(b) if the case was not conducted initially by the Board itself—within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the mailing under section 107 (e) [section 1217 (e) of this Appendix] of the notice of the decision of the Board not to review the case or the notice of the order of the Board determining the amount of excessive profits, file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency. The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo. • • •"

50 *U.S.C.* App. 1218(a):

"§ 1218a. Venue of appeals from Tax Court decisions.

"A decision of the Tax Court of the United States under section 108 of this Act [section 1218 of this Appendix] may, to the extent subject to review, be reviewed by—

"(1) The United States Court of Appeals for the circuit in which is located the office to which the contractor or subcontractor made his Federal income-tax return for the taxable year which corresponds to the fiscal year with respect to which such decision of the Tax Court was made, or if no such return was made for such taxable year, then by the United States Court of Appeals for the District of Columbia, or

"(2) any United States Court of Appeals designated by the Attorney General and the contractor or subcontractor by stipulation in writing.

26 U.S.C. 7441 (1954 Int. Rev. Code):

"§ 7441. Status

"The Board of Tax Appeals shall be continued as an independent agency in the Executive Branch of the Government, and shall be known as the Tax Court of the United States. The members thereof shall be known as the chief judge and the judges of the Tax Court."

26 U.S.C. 7482 (1954 Int. Rev. Code):

§ 7482. Courts of review

"(a) Jurisdiction.—The United States Courts of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of Title 28 of the United States Code.

"(b) Venue.—

"(1) In general.—Except as provided in paragraph (2), such decisions may be reviewed by the United States Court of Appeals for the circuit in which is located the office to which was made the return of the tax in respect of which the liability arises, or, if no return was made, then by the United States Court of Appeals for the District of Columbia.

"(2) By agreement.—Notwithstanding the provisions of paragraph (1), such decisions may be reviewed by any United States Court of Appeals which may be designated by the Secretary or his delegate and the taxpayer by stipulation in writing.

"(c) Powers.—

"(1) To affirm, modify, or reverse.—Upon such review, such courts shall have power to affirm or,

if the decision of the Tax Court is not in accordance with law, to modify or to reverse the decision of the Tax Court, with or without remanding the case for a rehearing, as justice may require.

"(2) To make rules.—Rules for review of decisions of the Tax Court shall be those prescribed by the Supreme Court under section 2074 of title 28 of the United States Code. Until such rules become effective the rules adopted under authority of section 1141 (c) (2) of the Internal Revenue Code of 1939 shall remain in effect.

"(3) To require additional security.—Nothing in section 7483 shall be construed as relieving the petitioner from making or filing such undertakings as the court may require as a condition of or in connection with the review.

"(4) To impose damages.—The United States Court of Appeals and the Supreme Court shall have power to impose damages in any case where the decision of the Tax Court is affirmed and it appears that the petition was filed merely for delay."

28 *U.S.C.* 7444:

"§ 7444. Organization

"(a) Seal.—The Tax Court shall have a seal which shall be judicially noticed.

"(b) Designation of chief judge.—The Tax Court shall at least biennially designate a judge to act as chief judge.

"(c) Divisions.—The chief judge may from time to time divide the Tax Court into divisions of one or more judges, assign the judges of the Tax Court thereto, and in case of a division of more than one Judge, designate the chief thereof. If a division, as a result of a vacancy or the absence or inability of a judge assigned thereto to serve thereon, is composed of less than the number of judges designated for the division, the chief judge may assign other judges to the division or direct the division to proceed with the transaction of business without awaiting any additional assignment of judges thereto."

26 *U.S.C.* 7459:

"§ 7459. Reports and Decisions

"(a) Requirement.—A report upon any proceeding instituted before the Tax Court and a decision thereon shall be made as quickly as practicable. The decision shall be made by a judge in accordance with the report of the Tax Court, and such decision so made shall, when entered, be the decision of the Tax Court.

"(b) Inclusion of findings of fact or opinions in report.—It shall be the duty of the Tax Court and of each division to include in its report upon any proceeding its findings of fact or opinion or memorandum opinion. The Tax Court shall report in writing all its findings of fact, opinions, and memorandum opinions."

26 *U.S.C.* 7460:

"§ 7460. Provisions of special application to divisions

"(a) Hearings, determinations, and reports.—A division shall hear, and make a determination upon, any proceeding instituted before the Tax Court and any motion in connection therewith, assigned to such division by the chief judge, and shall make a report of any such determination which constitutes its final disposition of the proceeding.

"(b) Effect of action by a division.—The report of the division shall become the report of the Tax Court within 30 days after such report by the division, unless within such period the chief judge has directed that such report shall be reviewed by the Tax Court. Any preliminary action by a division which does not form the basis for the entry of the final decision shall not be subject to review by the Tax Court except in accordance with such rules as the Tax Court may prescribe. The report of a division shall not be a part of the record in any case in which the chief judge directs that such report shall be reviewed by the Tax Court.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

GRANNIS & SLOAN, INC., AND CONTRACTORS MACHINERY COMPANY, PETITIONERS

v.

THE RENEGOTIATION BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINION BELOW

The determination of the Tax Court, filed on February 5, 1960 (T.C. Memo. 1960-12), is not published. The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App. 18-20) is reported at 285 F. 2d 908.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1961. By order of the Chief Justice,

the time for filing a petition for a writ of certiorari was extended to June 11, 1961. The petition was filed on June 10, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a determination by the Tax Court, under the Renegotiation Act, of the amount of a government contractor's excessive profits is subject to judicial review by the court of appeals.

STATUTE INVOLVED

50 U.S.C. App. 1191(e)(1), part of the Renegotiation Act, provides in pertinent part as follows:

> Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the mailing of the notice of such order under subsection (c)(1) of this section, file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency. The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before The

> Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo. * * *

STATEMENT

Pursuant to the Renegotiation Act, 50 U.S.C. App. 1191, *et seq.*, the Renegotiation Board determined that petitioners had realized $75,000 in excessive profits from their renegotiable business in the fiscal year ending December 31, 1952. Petitioners appealed to the Tax Court. A *de novo* trial was held and the Tax Court determined that the amount of petitioners' excessive profits was $75,000. Petitioners then sought review of the Tax Court determination in the United States Court of Appeals for the Fourth Circuit. In that court petitioners attacked the Tax Court's treatment of certain receipts and expenses in computing profits on renegotiable business. However, no constitutional issue was raised and no question was presented as to the renegotiability of the contracts involved. The court of appeals held that it lacked jurisdiction to review the determination of the amount of excessive profits realized on renegotiable business, and dismissed the petition for review (Pet. App. 20).

ARGUMENT

1. The determination by the Tax Court of the amount of excessive profits on renegotiable business is not judicially reviewable. The statute so provides

in clear and unequivocal terms, *i.e.*, the Tax Court "shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, *and such determination shall not be reviewed or redetermined by any court or agency*" (emphasis added). 50 U.S.C. App. 1191(e)(1), *supra*, p. 2. In *United States* v. *California Eastern Line*, 348 U.S. 351, 354-5, this Court stated explicitly that a determination of the amount of excessive profits is nonreviewable. The courts of appeals have likewise refused, on the ground of lack of jurisdiction, to review such determinations, including all issues of law and fact going to the amount of excessive profits. *Psaty and Fuhrman, Inc.* v. *Stimson*, 182 F. 2d 985 (C.A. D.C.); *Eastern Machinery Co.* v. *Under Secretary of War*, 182 F. 2d 99 (C.A. D.C.); *Ebco Manufacturing Co.* v. *Secretary of Commerce*, 221 F. 2d 902 (C.A. 6). See, also, *Vaughn Machinery Co.* v. *Renegotiation Board*, 273 F. 2d 235 (C.A. 6); *United States* v. *Martin Wunderlich*, 211 F. 2d 433 (C.A. D.C.); *Knu-Vise* v. *War Contracts Price Adjustment Board*, 195 F. 2d 198 (C.A. D.C.); *Lowell Wool By-Products Co.* v. *War Contracts Price Adjustment Board*, 192 F. 2d 405 (C.A. D.C.); *U. S. Electrical Motors* v. *Jones*, 153 F. 2d 134 (C.A. D.C.). Thus, the decision below is clearly correct, and there is an accord, rather than a conflict, of circuits.[1]

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[1] The 1956 amendment to the Renegotiation Act (50 U.S.C. App. 1218 (a) (Pet. App. 21)), enlarging the *venue* of appeals from Tax Court renegotiation decisions, did not enlarge the *jurisdiction* of the courts of appeals to review

2. Since the Renegotiation Act antedated petitioners' government contracts, it is apparent that petitioners entered into those contracts anticipating and agreeing to renegotiation, as well as to the finality of the Tax Court's determination of the amount of excessive profits. Petitioners should not now be heard to complain about the procedures they voluntarily accepted for determination of excessive profits on their contracts with the government. Cf. *United States* v. *Wunderlich*, 342 U.S. 98;[2] *Booth Fisheries Co.* v. *Industrial Commission*, 271 U.S. 208. See, also, *United States* v. *Strontium Products Co.*, 68 F. Supp. 886, 887 (S.D. W. Va.).

Moreover, it should be noted that the constitutional question which petitioners now seek to raise in this Court, was not properly presented to the court below. In any event, the argument is clearly without merit with respect to the Renegotiation Act, as the courts have several times held. *United States* v. *California*

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such Tax Court determinations. The amendment merely provides for venue, in an appropriate circuit, of appeals from Tax Court decisions, "to the extent subject to review". There was no purpose to alter the prior rule that the courts of appeals are without authority to review Tax Court renegotiation decisions except on issues going to the jurisdiction of the Tax Court, *e.g.*, the existence of renegotiable contracts.

[2] Under the so-called "Wunderlich" Act, 41 U.S.C. 321, the finality of administrative determinations under government contracts is not judicially reviewable unless fraudulent, capricious, arbitrary or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence.

[3] Other statutory provisions granting finality to administrative determinations have been upheld against attacks on

Eastern Line, 348 U.S. 351; *Spaulding* v. *Douglas Aircraft Co.*, 154 F. 2d 419, 427 (C.A. 9);[1] *Eastern Machinery Co.* v. *Under Secretary of War*, 182 F. 2d 99 (C.A. D.C.); see *Lichter* v. *United States*, 334 U.S. 742, 787-788.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Attorneys.

JULY 1961

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the basis of a claimed denial of due process. *Ludecke* v. *Watkins*, 335 U.S. 160; *Williamsport Wire Rope Co.* v. *United States*, 277 U.S. 551; *Plymouth Coal Co.* v. *Pennsylvania*, 232 U.S. 531; *Reetz* v. *Michigan*, 188 U.S. 505; *Brasier* v. *United States*, 223 F. 2d 762 (C.A. 8), certiorari denied, 350 U.S. 913; *American Fed'n of Labor* v. *National Labor Relations Board*, 308 U.S. 401; *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, 303; *United States* v. *Binghamton Construction Co.*, 347 U.S. 171.

[1] "The Constitution does not require the Congress to give to any litigant a right of appeal. Assuming that the Tax Court is no more than an administrative body, the finality of its decisions as to the amount to be recaptured violates no constitutional right."

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